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Duties to Non-Clients: Part II

California Joan takes another look at third party liability, particularly as it applies to the administration of estates

By ELLEN R. PECK

Meryl Terpitude, California Joan's senior partner, looked grim as he rushed into her office before she had a chance to gulp down her mocha latte. He threw a complaint down on Cali's desk and started talking. "Cali, you've got to help me with this case. I'm representing my old chum from law school, an estate administration and probate lawyer, Afta Urgone. Here's what happened:

"Dora Ded died on Jan. 1, 1996. She left two wills, executed in 1989 and 1994, respectively. Dora's nephew filed a probate court will contest to the 1994 will. During the will contest, the court appointed special administrator Barry Borrow, an attorney and former probate commissioner. Borrow retained my friend and client, Afta Urgone, to prepare the estate's necessary tax returns and other legal services. The probate court approved the estate's payment of Afta's fees for tax work he performed.

"Then things spiraled out of control! Borrow borrowed $115,000 from the estate without authority. When he confessed to Afta and begged for his help, Afta attempted unsuccessfully to arrange a loan to Borrow so that Borrow could pay the estate back. Then, Afta withdrew. Borrow died suddenly.

"In July 1998, Afta turned over the estate's file to Terry Taxlawyer, an attorney, who notified the Internal Revenue Service (IRS) that she represented Ded's estate exclusively.

"Three months later, the deadline passed for the Ded estate to file a form to claim a tax refund for three years, and Ded's estate lost the ability to claim a refund for substantial administrative expenses spent in the will contest.

"In January 2001, the court decided the will contest in favor of the 1989 will and appointed Ernest Exec as executor. In July 2001, Exec discovered that Ded's estate could not file for further tax refunds because the proper form had not been filed in time. On Nov. 21, 2004, Exec sued both Taxlawyer and Afta Urgone for legal malpractice.

"Cali, Exec was never Afta's client! I want to file a demurrer against Exec on the grounds that Afta owed no duty as an attorney to Exec because he was not in privity of contract. I think it is a slam dunk!" Meryl said vehemently.

"Meryl, I think you will lose based upon a July 2004 California Supreme Court case, *Borissoff v. Taylor & Faus*t (2004) 33 Cal.4th 523, 15 Cal. Rptr.3d 735 ('*Borissoff*'), that redefines client identity when lawyers represent the representatives of estates or trusts," Cali replied.

"In a matter of first impression in California, the court held that an estate's successor fiduciary may assert a professional negligence claim against tax counsel whom a predecessor fiduciary engaged exclusively to perform tax work for the estate." (*Borissoff*, supra, at pp. 528-529)

"How can that be?" sputtered Meryl. "Neither the estate nor the beneficiaries are generally considered a client under California law. A trust cannot be a client, because it is not a person but rather a fiduciary relationship with respect to property. A beneficiary cannot be a client, because fiduciaries and beneficiaries are separate persons with distinct legal interests. (*Borissoff*, supra, p. 529)

"The California Supreme Court concluded," Cali responded, "that the legislature had created standing of successor fiduciaries to sue lawyers hired to perform tax services for the estate by a predecessor through Probate Code §§8524, 9820 and 10801, which define the powers of fiduciaries and successor fiduciaries:

■ Sec. 10801, subd. (b), expressly authorizes a personal representative to 'employ or retain tax counsel' and to pay for such services from estate funds.

■ Sec. 8524, subd. (c), provides that a 'successor personal representative has the powers and duties in respect to the continued administration that the former personal representative would have had.'

■ Sec. 9820, subd. (a), provides that this includes the power to '[c]ommence and maintain actions and proceedings for the benefit of the estate.'" (Borissoff, supra, pp. 529-530)

"So," Meryl pondered, "if an attorney, retained by a fiduciary to provide estate tax assistance, commits malpractice harming the estate, the fiduciary can sue the attorney for the benefit of the estate to recover the loss. Even if that fiduciary is replaced, the successor acquires the same powers to sue for legal malpractice?" (*Borissoff*, supra, p. 530)

"I think you've got it, Meryl," Cali confirmed.

"I have one more objection to this holding. Afta advised Exec's predecessor, Borrow, in both his personal and fiduciary capacities. Doesn't that create a loyalty conflict of interest between Borrow, the predecessor, and Exec, the successor fiduciary? If so, how can Afta owe a duty to Exec?" Meryl asked.

"A potential conflict of interest may arise when a fiduciary requests a lawyer, retained to advise a fiduciary in an official capacity, for legal advice regarding detection of and liability for misappropriation. The lawyer may have no choice but to withdraw, as Afta did," Cali responded.

"But even if the attorney retained to provide tax services for an estate creates a conflict by providing personal as well as representative legal services to a predecessor fiduciary, there is still no inherent conflict in permitting successor fiduciary standing to sue an attorney for the harm caused to the estate arising from legal services provided for the benefit of the estate." (*Borissoff*, supra, pp. 533-534)

"O.K., no demurrer except arguing the statute of limitations." Meryl did not then gallop out of Cali's office as usual. "Afta has a few other issues, Cali. In 1989, Dora retained Afta to draft a will that would revoke prior wills and codicils and name Ada Ayuda, Dora's caregiver and nurse, as the executor and sole beneficiary. When he prepared the will, Afta knew that Ayuda was Dora's caregiver."

Meryl cleared his throat. "However, the 1989 will failed to include a Certificate of Independent Review as required by Probate Code §21350 et seq. Dora's nephew objected to Ayuda's petition in the will contest based upon Ayuda's undue influence. The probate court found that Ayuda failed to establish that the transfer of property to Ayuda in the 1989 will was not the product of fraud, menace, duress or undue influence. (Prob. C., §21351, subd.(d))

"Ayuda then sued Afta for failing to exercise reasonable care in performing legal services for Dora. Surely, Ayuda does not have standing to sue Afta!" Meryl exclaimed.

"Meryl, this is identical to a recent case entitled *Osornio v. Weingarten* (2004) — Cal.App.4th –, — Cal.Rptr.3d – [2004 Daily Journal D.A.R. 14,027, 2004 WL 2650531] ('*Osornio*'). The good news is Ayuda has no standing to allege Afta's negligence in the performance of legal services to Dora."

Cali delivered the bad news. "However, Ayuda can amend her complaint to allege that Afta owed her a duty as a non-client. In a case of first impression, the court held that an attorney owes a duty of care to a prospective beneficiary serving as the testator's care custodian, to ensure that statutory presumptive disqualification of care custodian as donee is overcome."

"How can Afta owe a duty to a care custodian beneficiary?" Meryl roared so loudly that the passing law clerk twins appeared in Cali's office to assist.

"An attorney generally has no professional obligation to non-clients. (*Osornio*, supra, pp.____, citing Vapnek et al., *Cal. Practice Guide: Professional Responsibility* (The Rutter Group 2004) ¶6:240, pp. 6-38.) Also, a number of California appellate decisions have held that attorneys owe no duties to beneficiaries of wills or trusts." (*Ventura County Humane Society v. Holloway* (1974) 40 Cal.App.3d 897, 905, 115 Cal.Rptr. 464 [lawyer has no duty to a class of potential beneficiaries-charities unable to take a bequest under the testator's will because the bequest did not properly name the charities. The lawyer should not be held accountable for using the names of the beneficiaries, as given to him by the testator, even though the testator's identification of the beneficiaries would later prove to be ambiguous]; *Radovich v. Locke-Paddon* (1995) 35 Cal.App.4th 946, 41 Cal.Rptr.2d 573 [no duty to beneficiary where testator died without signing a will attorney delivered two months before death, since an attorney's primary duty of undivided loyalty was to the decedent-client]; *Goldberg v. Frye* (1990) 217 Cal.App. 3d

1258, 266 Cal. Rptr. 483 [rejecting administrator's attorney duty to legatee, holding that principal purpose of attorney's engagement was to counsel fiduciary and not to benefit legatees]; *Moore v. Anderson Zeigler Disharoon Gallagher & Gray* (2003) 109 Cal.App.4th 1287, 1294-1295, 135 Cal.Rptr.2d 888 [lawyer has no duty to beneficiaries under a will to evaluate and ascertain the client's testamentary capacity when seeking to amend or make a new will].)

The twins, Lara and Lanny Lawclerk chimed in: "True. Courts balance several factors in determining whether a lawyer should owe a duty to a non-client:

1. the extent to which the transaction was intended to affect the plaintiff,

2. the foreseeability of harm to the plaintiff,

3. the degree of certainty that the plaintiff suffered injury,

4. the closeness of the connection between the lawyer's conduct and the injury suffered,

5. the moral blame attached to the lawyer's conduct,

6. the policy of preventing future harm,

7. the likelihood that imposition of liability might interfere with the attorney's ethical duties to the client, and

8. whether the imposition of liability would impose an undue burden on the profession." (*Boranian v. Clark* (2004) 123 Cal.App.4th 1012, 20 Cal. Rptr.3d 405; *Moore*, supra, 109 Cal. App.4th at p. 1295)

Lara Lawclerk added: "In *Osornio*, the court found that the testator's will was to benefit Osornio, the care giver-donee; that a lawyer could foresee that a failure to include the Certificate of Independent Review in the will would deprive Osornio of the testator's intended gift; and that she would suffer harm." (Osornio, supra, p. 13.)

Lanny Lawclerk continued, "The court acknowledged that the closeness of the attorney's conduct to the injury would only be resolved after the presentation of significant evidence. However, other factors were present. Prior cases imposed similar duties where beneficiaries are deprived of intended transfers of property as a result of failed wills or trusts. It would encourage the competent practice of law by counsel representing testators, trustors and other clients making donative transfers to persons presumptively disqualified under Probate Code §21350(a). The court did not foresee that there would be an undue burden on the profession." (*Osornio*, supra, p. 13-14)

Cali concluded, "The court held that the 'attorney owes a duty of care (1) to advise the client that, absent steps taken under §21351(b), the subject transfer to the proposed transferee, if challenged, will have a significant likelihood of failing because of the proposed transferee's presumptive disqualification under §21350(a); and (2) to recommend that the client seek independent counsel in an effort to obtain a Certificate of Independent Review provided under §21351(b). It further held that this duty of care is owed to both the tranferror-client and to the prospective transferee." (*Osornio*, supra, pp. 15-16)

By this time, Meryl was pale and had sunk low in his seat. "I have another situation," he croaked. "About three months before Dora died, while she was seriously ill and her niece Nancy was visiting, Dora asked Afta to prepare a transfer of a summer house to Nancy. Afta prepared the deed, signed by Dora, but did not record it until several months after her death because he wanted to protect the elderly Dora. In the will contest, the court determined that Dora did not intend to transfer the property and Dora's nephew got everything. Nancy has also sued Afta for legal malpractice for failing to immediately record the deed. Is Nancy going to be able to maintain the action, too?"

"No!" The Lawclerk twins said simultaneously. "In *Featherson v. Farwell* (2004)123Cal.App.4th 1022, 20 Cal.Rptr.3d 412, in almost identical circumstances, the Court of Appeal held there was no duty to the plaintiff. The court reasoned that the lawyer's duty was to the testator; he had that duty in mind when he did not immediately record the deed, in order to protect his elderly client. Since the probate court found that the testator did not intend to deliver the deed, imposing a duty upon the lawyer to act in the beneficiary's best interests would necessarily result in a breach of the lawyer's duty to the testator, a classic example of divided loyalty."

Cali also added, "In *Boranian v. Clark* (2004) 123 Cal.App.4th 1012, 20 Cal.Rptr.3d 405, a lawyer prepared a new will for a hospitalized client, giving part of her estate to her boy-friend. After a will contest between testator's children and the boyfriend resolved by settlement, the children sued the lawyer for malpractice and breach of fiduciary duty. The Court of Appeal held that the lawyer owed no duty to the children, since a lawyer who believes in a client's intent to dispose of property in a certain manner and who drafts the will accordingly, fulfills a duty of loyalty to that client. The lawyer is not required to urge the testator to consid-

er an alternative plan to forestall a claim by someone who would be excluded from or included in a will, but deprived of a specific asset bequeathed to someone else." (*Boranian*, supra, at pp. 1019-1020)

"Well, at least the duty has not been extended to these non-clients!" Meryl said in gratitude. "Aren't you afraid to become a lawyer, with liability flying at you from new sources all the time?" Meryl asked the Lawclerk twins.

"No!" the twins said in unison. "These cases have taught us two cardinal principles about being a lawyer: (1) a lawyer should have undivided loyalty to the client-testator's interests, unaffected by interests of potential beneficiaries; and (2) in carrying out the testator-client's wishes, the lawyer should be competent, giving the client the advice and counsel necessitated by the standard of care!"

■ *Ellen R. Peck, a former judge of the State Bar Court hearing department in Los Angeles and a member of the State Bar's Commission on Revision of The Rules of Professional Conduct, is a sole practitioner in Escondido and a co-author of The Rutter Group's California Practice Guide — Professional Responsibility.*

Test — Legal Ethics
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1. An estate's successor fiduciary may assert a professional negligence claim against tax counsel whom a predecessor fiduciary engaged exclusively to perform tax work for the estate.

2. A trust cannot be a client, because it is not a person but rather a fiduciary relationship with respect to property.

3. A beneficiary can be a client, even though fiduciaries and beneficiaries are separate persons with distinct legal interests.

4. Successor fiduciaries are permitted by judicially created case law to sue lawyers hired to perform legal services for the estate by a predecessor.

5. A section of the Probate Code authorizes a personal representative to employ or retain tax counsel and to pay for such services from estate funds.

6. An estate's personal representative has no power to commence and maintain legal actions or proceedings, even if they benefit the estate.

7. A successor personal representative stands in the shoes of a predecessor personal representative respecting powers and duties regarding the continued admin istration of the estate or trust.

8. If an attorney, retained by a fiduciary to provide estate tax assistance, commits malpractice harming the estate, the fiduciary may sue the attorney for the benefit of the estate to recover the loss, only when all beneficiaries agree.

9. Even if a fiduciary is replaced, the successor acquires the same powers to sue for legal malpractice.

10. A potential conflict of interest may arise when a fiduciary requests a lawyer, retained to advise a fiduciary in an official capacity, for legal advice regarding detection of and liability for misappropriation, which may create an obligation to withdraw.

11. There is an inherent conflict of interest in permitting successor fiduciary standing to sue an attorney for the harm caused to the estate arising from legal services provided for the benefit of the estate.

12. An attorney owes a duty of care to a prospective beneficiary serving as the testator's care custodian, to ensure that statutory presumptive disqualification of care custodian as donee is overcome.

13. An attorney generally has professional obligations to many non-clients.

14. A number of California appellate decisions have refused to expand attorneys' third party liabilities to beneficiaries of wills or trusts.

15. An attorney has no duty to a class of potential beneficiary charities who were unable to obtain a bequest because the bequest did not state the proper name of the beneficiary.

16. A lawyer has no duty to a beneficiary to ensure that a testator signs a will where the lawyer delivered the draft will to the testator two months before death.

17. A lawyer owes a duty to beneficiaries under a will to evaluate and ascertain the client's testamentary capacity when seeking to amend or make a new will.

18. In considering whether to impose third party liability upon lawyers, courts balance several factors, including (1) the extent to which the transaction was intended to affect the plaintiff, (2) the foreseeability of harm to the plaintiff, (3) the degree of certainty that the plaintiff suffered injury, (4) the closeness of the connection between the lawyer's conduct and the injury suffered, (5) the likelihood that imposition of liability might interfere with the attorney's ethical duties to the client, and (6) whether the imposition of liability would impose an undue burden on the profession.

19. A lawyer who was directed by an elderly client to transfer real property to a beneficiary, but who did not record the deed transferring the property for several months after the death of the client in order to protect his elderly client, did not owe a duty to the beneficiary.

20. A lawyer who prepared a new will for an elderly client which gave part of her estate to her boyfriend, taking the same property away from the previous bene-

ficiaries, her children, does not owe a duty to the children to protect their interests in the property. "Unless you have evidence that Samos made the claimed promises after each of Kate's statements at the hearings, it seems that there is no probable cause to continue with the fraud action. Kate's statements at the hearings demonstrate that she knew that Samos would not get her house back, would not represent her in the separate malpractice action and would not continue to represent her in the foreclosure action against the non-settling defendant," Cali pointed out. (Cf. *Zamos*, pp. 970-972.)

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